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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-747

DAN J. SHEEHAN COMPANY,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner Dan J. Sheehan Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 8, 1975.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears as Appendix A hereto.[1] The order and opinion of the Occupational Safety and Health Review Commission Administrative Law Judge, reported at 8 OSAHRC 967 (1974), is reprinted as Appendix B. Pursuant to 29 U.S.C. § 661(i), the Administrative Law Judge's order became the final order of the Commission on May 31, 1974, after no Commissioner had directed that it be reviewed.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1975, and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the enforcement procedures set up by the Occupational Safety and Health Act of 1970 unconstitutionally chill the employer's right to a meaningful

[1] Simultaneously herewith, a Petition for Certiorari, No. ____, is being filed in the case of *Atlas Roofing Company, Inc. v. OSHRC*, seeking review of a Fifth Circuit panel decision rejecting related constitutional claims. *See Atlas Roofing Company, Inc. v. OSHRC, et al.*, ____ F.2d ____ (Dkt. No. 73-2249, September 8, 1975). A Petition for Certiorari is also being filed in *Frank Irey, Jr., Inc. v. OSHRC*, seeking review of a Third Circuit en banc decision that rejected related constitutional claims. *See Frank Irey, Jr., Inc. v. OSHRC*, et al., ____ F.2d ____ (Dkt. No. 73-1765, July 24, 1975).

hearing because they empower the Occupational Safety and Health Review Commission (1) to increase the penalty assessed by the Secretary of Labor if the employer chooses to seek administrative review of the Secretary's action; (2) to assess retroactive penalties if the Commission deems the employer's petition not to have been taken in good faith; and (3) to assess penalties during the pendency of the employer's appeal to the court of appeals.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 *et seq.* (1970), appears as an appendix to the *Irey* companion Petition.

The Fifth Amendment of the United States Constitution provides, in relevant part, that, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner is a painting contractor in the construction industry. Following the accidental electrocution of one of petitioner's employees, representatives of the Occupational Safety and Health Administration visited and inspected the job-site. Subsequently, on August 3, 1973, the Secretary of Labor issued a citation charging that Petitioner had violated the "General Duty Clause" of the Occupational Safety and Health Act (OSHA). That provision requires an employer to "furnish to each of his employees employment and a place of

employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injury." 29 U.S C. § 654(a)(1).

The Secretary charged that Petitioner had violated the General Duty Clause by permitting employees to work on a metal scaffold which was erected too close to a high power electrical transmission line. The penalty proposed by the Secretary was a fine of $500.00, which by force of statute would become final unless Petitioner contested the citation. 29 U.S.C. § 659(a). Petitioner had conceded the violation but protested the assessment of a penalty,[2] and a hearing was held before an Administrative Law Judge. The Judge declined to review Petitioner's challenges to the validity of the citation and affirmed the $500.00 penalty. When no member of the Occupational Safety and Health Review Commission (OSHRC) elected to have the Commission review the case, the Administrative Law Judge's order became final. 29 U.S.C. § 661(i).

Petitioner sought review of the Commission's order in the Court of Appeals for the Fifth Circuit, challenging the constitutionality of the OSHA enforcement procedures. Among the several constitutional challenges raised was the claim that the OSHA procedures violate the due process clause of the Fifth Amendment because the Act contains a built-in chilling effect that deters employers from contesting citations and penalties assessed by the Secretary of Labor. Petitioner pointed

[2] Petitioner wrote a "conciliatory" (App. A, p. 5) letter to the Secretary stating that he was not contesting the citation but asking reconsideration of the proposed penalty. The Administrative Law Judge construed the letter as contesting only the penalty. (App. B, p. 4).

to three ways in which the OSHA procedures effected this "chill" and thus denied employers a fair right to a hearing on the charges against them.

First, if the employer contests the citation or penalty assessed by the Secretary, the Commission is statutorily empowered to increase the amount of the penalty assessed. 29 U.S.C. § 666(i).[3]

Second, if the Commission determines that the employer's request for review was not in good faith, or was taken solely for purposes of delay, it has statutory authority to assess retroactive penalties against the employer for failing to abate the alleged violation. 29 U.S.C. § 666(d).[4]

[3] For example, when Frank Irey, Jr., Inc., Petitioner in the companion case from the Third Circuit (*see* note 1, *supra*), appealed its $5,000.00 penalty to the Review Commission, it was notified that one of the issues on appeal would be whether the penalty would be increased to $10,000.00. The majority panel opinion in the *Irey* case commented on this policy with disfavor. *See Frank Irey, Jr., Inc. v. O.S.H.R.C., et al.*, ____ F.2d ____, (3rd Cir., No. 73-1765, November 4, 1974) (Slip opinion, p. 4 n.3). *Cf. Madden v. Hodgson*, 502 F.2d 278 (9th Cir. 1974); *Brennan v. O.S.H.R.C.*, 492 F.2d 1027 (2nd Cir. 1974).

[4] The Secretary of Labor insures that each employer served with a citation and assessed a penalty is aware of this power by including at the bottom of the document entitled "Notification of Proposed Penalties" the following paragraph:

> In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

Third, unless a court of appeals stays the order of the Commission, penalties for non-abatement of the alleged violation run throughout the period in which the employer's appeal is pending in the Court of Appeals. 29 U.S.C. § 660(a).[5]

The court concluded that even though Petitioner's penalty had not been increased, Petitioner had standing to raise the "chilling effect" argument because "the chilling effect of the statutory scheme has already taken its toll in this litigation." (App. A, p. 5). The court accepted Petitioner's contention that if it had not been for the possibility of increased penalties, Petitioner would have initially challenged the citation as well as the penalty, and "would not have felt the necessity to couch his objections to the Secretary's actions in such conciliatory language." (App. A, p. 5). The court concluded that in light of these factors, "Sheehan [is] sufficiently aggrieved to raise the chilling effect question." (App. A, p. 5).

Having found that Petitioner had standing to raise the claim, however, the court held that the OSHA procedures do not unconstitutionally chill an employer's right to contest the Secretary's action. While recognizing that the OSHA scheme suffers from many of the infirmities that this Court deemed suspect in other schemes permitting increased penalties upon or after appeal, the Fifth Circuit panel concluded that the OSHA scheme was saved from unconstitutionality for

[5] A three-judge district court in the case of *Lance Roofing Company, et al. v. Hodgson, et al.*, 343 F.Supp. 685 (N.D. Ga.), *aff'd.*, 409 U.S. 1070 (1972), determined that an employer could be assessed additional penalties, assuming a typical 30-day abatement period, of up to $335,000.00 during a typical one year appeal to the Fifth Circuit. *Id.* at 689.

two reasons. First, the court stated, the OSHA review system is like a *de novo*, or two-tiered, trial system, since "the body which has the power to increase the penalty is not the same body which imposed the initial, lighter penalty." The similarity to a two-tiered system, the court concluded, brought the OSHA scheme within the reach of *Colten v. Kentucky*, 407 U.S. 104 (1972), where this Court held that the imposition of a greater sentence after trial *de novo* in a court of general jurisdiction did not offend due process. (App. A, pp. 6-7).

As a second ground, the court held that the scheme was saved by the ultimate availability of judicial review. The court wrote:

> If the Commission does not offer any reason for its decision to increase or if there is evidence that the increase was designed to penalize the employer for exercising its right to contest, the court will be in a position to correct such an abuse of discretion. The opportunity for such corrective action by the courts is a sufficient safeguard to allay the fears of employers who might be fearful that a contest of a citation and proposed penalty would hazard increased penalties by way of retribution. (App. A, p. 7).

Similarly, the court held that review by the Court of Appeals, under an "abuse of discretion" standard, was a sufficient safeguard against the Commission's improper assessment of retroactive penalties. (App. A, pp. 7-8). As to the claim that absent a stay, penalties accrued automatically during the pendency of review proceedings in a court of appeals, the court wrote:

> As is evidenced by the Commission's willingness to stay its penalty order in the case at bar, an employer is not likely to be deterred from

appealing an incorrect decision because of the necessity of asking for a stay from the court or Commission. (App. A, p. 8).

REASONS FOR GRANTING THE WRIT

1. The "O.S.H.A. Chill" Presents An Important Question Of Constitutional Law

As we have noted in the *Atlas Roofing* and *Irey* Petitions, the OSHA enforcement procedure has been widely regarded as a novel approach to administrative procedure that is expected to be widely imitated. Accordingly, the importance of this Court's carefully considering the various constitutional problems that are raised by the OSHA enforcement procedures is a matter that extends beyond the scope of the Occupational Safety and Health Act itself.

The several courts that have faced the issue raised in this case have disagreed sharply over whether the Commission can legitimately increase penalties and impose them retroactively. While the Fifth Circuit in this case squarely upheld the constitutionality of the Commission's increase in the statutory penalty, the Ninth Circuit has suggested that the Commission has no power to increase the proposed penalties, *Dale M. Madden Construction, Inc. v. Hodgson, supra,* at 281, and a three-judge district court has noted in dictum that since the Act "does not appear to provide any effective means for challenging" the retroactive assessment of non-abatement penalties, that procedure constitutes another "chilling" factor, *Lance Roofing Co., et al. v. Hodgson, supra.* Beyond these judicial misgivings, the commentators have been sharply critical

of the "enhancement" provisions of the Act because of their potential *in terrorem* effect on employers seeking review of citations and proposed penalties. *See* Hay, *OSHA Penalties: Some Constitutional Considerations,* 10 IDAHO L. REV. 223 (1974); McClintock & Bohrnsen, *Constitutional Challenges,* 9 GONZAGA L. REV. 361 (1974); Note, *OSHA: Employer Beware,* 10 HOUSTON L. REV. 426 (1973).

As is demonstrated by the increasing volume of OSHA appellate litigation, the principles raised by this and the related Petitions are of substantial importance to employers and to the enforcement of this wide-ranging Act. For the four-year period from its inception in April 1971 through April 1975, OSHA issued some 155,827 citations, with accompanying civil penalties, 5 OSHA REP. 155 (BNA July 3, 1975), and according to a compilation dated May 16, 1972, the Secretary's proposed penalties to date had been increased by the Commission in approximately 15% of the cases in which the employer sought review. (App. A, p. 5 n.2). In addition, employers in every case continue to be subjected to the threat of retroactive and accumulating penalties. An employer who believes that a cited condition is not a violation of the Secretary's regulation must face a threatened daily penalty of up to $1,000.00 if the Review Commission is not satisfied with his "good faith" in seeking review. Under these circumstances it is likely that in many instances the employer will yield rather than assume the risk of such a staggering penalty.

Finally, as we seek to show in the following two sections of this Petition, the opinion below embodies a significant and potentially mischievous misinterpretation of this Court's cases dealing with the chilling effect of

increased penalties on appeal. By relying on the availability of judicial review to cure any unfairness inherent in the OSHA enforcement scheme, the Court of Appeals has distorted the thrust of this Court's cases in this area and adopted a mode of analysis that effectively limits those cases to their facts.

This case is thus important for a number of reasons: because of the confusion among the lower courts on this difficult issue; because of the importance of the OSHA enforcement scheme to employers generally; because of the attention directed to OSHA as a potential model for administrative procedure; and because of the serious analytical error committed by the court below, which could have effects well beyond the limits of the OSHA enforcement scheme.

2. The Court Below Erred In Holding That The Availability Of Judicial Review Rendered The Possibility Of Increased Penalties Innocuous

In a line of cases starting with *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court has carefully scrutinized statutory schemes under which persons seeking to appeal adverse decisions have been subject to increased penalties on or after appeal. The Court has been particularly sensitive in these cases to the possibility that individuals will be dissuaded from appealing adverse decisions because of the fear of enhanced penalties. The "chill" on the right to appeal has been held to violate due process in those circumstances in which the likelihood of vindictiveness under the statutory scheme is apt to discourage defendants from exercising their appeal rights. *North*

Carolina v. Pearce, 395 U.S. 711, 725 (1969); *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). As the court below recognized, however, the due process analysis requires consideration of the potential vindictiveness of the statutory scheme in general; it does not require the individual to prove that he was subjected to vindictiveness in his case. The focus is on "the institution or system under scrutiny, rather than merely focusing on the individuals involved or the facts present in the particular situation." (App. A, p. 6).

In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), this Court distinguished jury sentencing from sentencing by a judge in determining whether heavier sentences on retrial violated due process. In making this distinction, the Court pointed to various factors, relevant by analogy here, which served to immunize jury resentencing from the constitutional infirmities of *Pearce*, where the resentencing was done by a judge. First, the jury, unlike the judge, has no knowledge of the prior sentence. Second, the jury is normally unaware of what the charge was in the first trial, and whether it ended in conviction or a mistrial. Third, the resentencing is done by a different judicial body. Fourth, "the jury was unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." 412 U.S. at 27.

The court below conceded that the OSHA enforcement scheme failed all of these tests except the third.[6] The Court recognized that under OSHA:

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[6] As to the third factor – that the resentencing was done by a different body – Petitioner contends that the Fifth Circuit panel misread the thrust of the analysis in *Chaffin*. The fact that a different body did the sentencing the second time was relevant

> the Commission will of necessity be informed of the proposed penalty and of the circumstances surrounding the issuance of the citation. Further, it could be argued that the Commission has an institutional interest in discouraging employer-initiated appeals from the Secretary's orders. (App. A, p. 7).

In spite of these concessions, the Fifth Circuit panel held that the OSHA scheme passed muster because the Court of Appeals could reverse the Commission under the "abuse of discretion" standard if "the Commission does not offer any reason for its decision or if there is evidence that the [increased penalty] was designed to penalize the employer for exercising its right to contest." (App. A, p. 7).

This analysis will not withstand scrutiny. The fact that judicial review is available does not cure unfairness in the OSHA scheme any more than judicial review can be said to vitiate the evils of the statutory scheme in *Pearce*. Indeed, many types of unfairness in the administrative process may be examined on review. But that is not to say that an unfair statutory scheme can be upheld because isolated instances of particular unfairness can be reversed in the Court of Appeals. The

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there only to the extent that the second jury would not be likely to be moved by vindictiveness. In *Blackledge v. Perry*, 417 U.S. 21 (1974), however, the court encountered a situation in which the sentencing was done by two different courts, but because the prosecutor was in a position to increase the risk of a harsher sentence before the second tribunal, the court held the system bad under the principles of *Pearce*. Thus, there is no magic in the fact that different bodies do the sentencing in the first and second instance. If the possibility of vindictiveness is present and if it threatens to discourage appeals, the scheme must be stuck down.

course of the Fifth Circuit's reasoning seems to be: (1) true, the OSHA "increased penalty" scheme may be unfair; (2) but because the penalty is subject to review, the courts can determine on a case-by-case basis when it seems most unfair; (3) therefore, the scheme is *not* unfair.

There are obvious problems with this analysis. *First*, the *Pearce* line of cases, as the court below itself recognized, is addressed to the potential unfairness of each different scheme, *not* the degree of unfairness of the scheme as it impinges on each individual. The Fifth Circuit's analysis requires a case-by-case inquiry – just what the *Pearce* line of cases counsels against. In *Blackledge v. Perry*, *supra*, the Court made precisely this point:

> There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retalitory motivation on the part of the sentencing judge." 417 U.S. at 28.

Second, the fact that the Court of Appeals reviews the Commission's actions on an "abuse of discretion" standard suggests that only the grossest cases will produce reversals. The "abuse of discretion" standard is a notoriously loose one; for the adjudication of constitutional rights, it is far too porous.

Third, the court below effectively shifted the burden of proof of vindictiveness to the complaining employer. Under the court's holding, as long as the Commission gives *some* reason for increasing the penalty, the employer must evidently produce "evidence that the increase was designed to penalize the employer for exercising its right to contest." Obviously, producing such evidence will usually be next to impossible. *See North Carolina v. Pearce*, 395 U.S. at 725 n.20. The whole point of the *Pearce* line of cases is to avoid placing the burden on the defendant to show vindictiveness in each case. *See id.* at 726. Yet that is the burden that the court below has imposed on employers seeking to challenge increased penalty assessments.

Fourth, the system envisioned by the Court of Appeals will undercut the major premise of the "chilled appeal" cases – to protect those who fear exercising their rights to appeal because of the potential for vindictiveness. The only beneficiaries of the scheme designed by the Court of Appeals would be those bold enough to run the gauntlet and take their appeals. Only they would be able to present their claims of vindictiveness to the reviewing court. To suppose that more timid employers will take heart from the prospect that they might be able to discover evidence of vindictiveness sufficient to trigger an abuse of discretion ruling from a court of appeals is to place unrealistic faith in the hardiness and perserverance of litigants.

3. The Court Below Erred In Holding That The OSHA Review Procedure Is Analogous To A Two-Tiered De Novo Trial System And Thus Avoids The Due Process Problems Ordinarily Associated With The Increase Of Penalties Following An Appeal

To the extent that the court below relied on the analogy to *de novo* trial systems,[7] the court erred. The OSHA procedure is the very antithesis of a *de novo* scheme. In a trial *de novo* system, a defendant is tried first in a lower court. If convicted there he has the option of proceeding in another court of general jurisdiction – as if nothing had happened below. He gets a fresh start and, in essence, a full second chance in the second court. The defendant need not allege any errors in the first trial, nor is the judge or jury bound in any way by any of the findings made or penalties assessed in the first proceeding. In *Colten v. Kentucky*, *supra*, this Court held that because of the special structure of this system, the risk that a defendant exercising his right to a second *de novo* trial would be subjected to a heavier penalty upon conviction in the second forum did not constitute a violation of due process. The Court wrote that:

> the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce*, . . . [does not inhere] in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear

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[7] The panel's opinion does not make entirely clear whether the court regarded the de novo analogy as a separate ground for its holding, as part of its holding, or merely as a factor rendering the Petitioner's claim less sympathetic. (App. A, pp. 6-7).

> of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system. 407 U.S. at 116.

The *Colten* Court noted that the two trial tribunals were entirely separate. The second was not called upon to redo or review the work of the first. The *de novo* court is generally unaware of the sentence imposed in the inferior court, and the *de novo* court can hardly be said to have "enhanced" the sentence. The availability of trial in the inferior court, the Court pointed out, actually works to the defendant's advantage, not his disadvantage; if he prefers to stage his challenge to the prosecution in the *de novo* court, he can plead guilty in the inferior court and effectively begin the process in the *de novo* court.

Under OSHA, the relationship between the Secretary of Labor and the Commission is dramatically different. The two bodies do not operate on independent levels at all; indeed, if the employer does not contest the Secretary's citation and penalty, they become final, and "are deemed a final order *of the Commission* . . . ." 29 U.S.C. § 659(b) (emphasis added). The hearing before the Commission's Administrative Law Judge is not independent of the Secretary's determination at all – it is entirely framed by, directed by, and focused on, the correctness *vel non* of that determination. The Commission's posture is therefore like that of an appellate court or a trial court acting on an indictment – not like a *de novo* court at all. And just as it violates due process for a trial court to punish a defendant for exercising his right to go to trial, *see Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960); *cf. United States*

v. Jackson, 390 U.S. 570, 581-85 (1968), it violates due process for the Commission to be given the authority to increase penalties when employers seek review. For the court below to state that the Commission "is not the same body which imposed the initial, lighter sentence" thus wholly misses the point. The evil identified in *Pearce* was that the fear of vindictiveness "may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction . . . ." 395 U.S. at 725. The fact that the vindictiveness may come from the Commission directly rather than from the Secretary is of little relevance as long as the employer's fear of an enhanced sentence imposes a significant burden on his willingness to exercise his rights to a due process hearing before the Commission.

In this regard, the problem under OSHA is much more like the one presented in *Blackledge v. Perry*, *supra*, than the one in *Colten v. Kentucky*. Like *Colten*, *Blackledge* involved a *Pearce* challenge in the context of a *de novo*, or two-tiered, trial system. The Petitioner was tried and convicted in the first court on a misdemeanor charge. When he sought a *de novo* review of his conviction in the second court, the prosecutor obtained an indictment covering the same conduct but charging him with a more serious felony offense. The Court distinguished *Colten* and held that the principles of *Pearce* compelled reversal of the second conviction. "The question," the Court wrote, "is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." 417 U.S. at 27. Answering that question in the affirmative, the Court wrote:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals – by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy – the State can assure that only the most hardy defendants will brave the hazards of a *de novo* trial. 417 U.S. at 27-28.

As in *Blackledge*, the possibilities of vindictiveness in the OSHA setting are manifest. The number of citations filed each year is so great that the Commission clearly has an institutional interest in limiting the number of citations and penalties that are challenged. And as in *Blackledge*, the Commission "has the means readily at hand to discourage" appeals both from the Secretary's citations and to the Courts of Appeals. The Commission can increase the Secretary's proposed penalty, it can impose retroactive daily non-abatement penalties, and it can permit the penalties to accrue throughout the period that the case is pending in the Court of Appeals. The Commission can thus "insure that only the most hardy defendants will brave the hazards" of seeking review of the Secretary's citation in the Commission, and review of the Commission's order in the Court of Appeals.

CONCLUSION

The issue presented in this case is important to the administration of OSHA as well as to the future interpretation of this Court's cases dealing with the permissibility of increased penalties after appeal. Twice before, this Court has been faced with this issue, and on each occasion the Court has affirmed (with Mr. Justice Stewart indicating he would note probable jurisdiction) a lower court decision requiring the appellant to exhaust his administrative remedies. *Lance Roofing Co. v. Hodgson, supra; Frank Irey, Jr., Inc. v. Hodgson*, 354 F.Supp. 20 (N.D. W. Va.), *aff'd mem.*, 409 U.S. 1070 (1972). This time the Petitioner has carried its claim through the administrative process, and the court below, recognizing that Petitioner has standing to raise the claim, has squarely ruled on the merits of that claim. The issue is thus ripe for this Court's resolution, and an authoritative ruling on the issue is called for.

Respectfully submitted,

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APPENDIX A

DAN J. SHEEHAN COMPANY, Petitioner.

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, and John T. Dunlop, Secretary of Labor, Respondents.

No. 74-2764.

United States Court of Appeals, Fifth Circuit.

Oct. 8, 1975.

On petition for review of an order of the Occupational Safety and Health Review Commission, the Court of Appeals, Clark, Circuit Judge, held that (1) even construed in light most favorable to him, letter sent by cited contractor to the Occupational Safety and Health Review Commission failed to contest the violation and was at most a weak attempt to contest the proposed penalty, (2) the contractor's contest of the penalty did not give judge jurisdiction to review the validity of the citation, and (3) the OSHA enforcement procedures do not operate to unconstitutionally chill an employer's right to initiate a hearing under the Act.

Affirmed.

1. Labor Relations ⇐1056

Even construed in light most favorable to him, letter sent by cited contractor to the occupational Safety and Health Review Commission failed to contest the violation and was at most a weak attempt to contest the proposed penalty. Occupational Safety and Health Act of 1970, § 2 et seq., 5(a)(1), 29 U.S.C.A. §§ 651 et seq., 654(a)(1).

2. Labor Relations ⇐1056

Contractor's contest of the penalty assessed against him under the Occupational Safety and Health Act did not give judge jurisdiction to review the validity of the citation. Occupational Safety and Health Act of 1970, § 10(a), 29 U.S.C.A. § 659(a).

3. Constitutional Law ⇐42.1(6)

Since contractor, allegedly to avoid possibility of increased penalties, failed to contest his citation under the Occupational Safety and Health Act and thus waived his right to a hearing on that issue, he was sufficiently aggrieved to have standing to raise claim that the expedited Occupational Safety and Health Act enforcement scheme has a built-in "chilling effect" which deters employer from contesting citations and penalties and consequently denies them their right to a hearing. Occupational Safety and Health Act of 1970, §§ 11(a), 17(d, j), 29 U.S.C.A. §§ 660(a), 666(d, j).

4. Labor Relations ⇐1052

Occupational Safety and Health Act enforcement procedures do not operate to unconstitutionally chill an employer's right to initiate a hearing under the Act, although the Commission may conceivably increase amount of penalty proposed by Secretary of Labor if the employer chooses to contest the citation or penalty, although the Commission has the power to retroactively assess nonabatement penalties from the date of citation if it finds that the employer-initiated review was not in good faith or was instituted solely for delay or avoidance of penalties, and although a final Commission order is not automatically stayed by commencement of review proceedings. Occupational Safety and Health Act of 1970, §§ 11(a), 17(d, j), 29 U.S.C.A. §§ 660(a), 666(d, j).

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5. Constitutional Law ⇐318(7)

A system that allows the imposition of a more severe penalty following a successful appeal is not per se constitutionally infirm; instead, the potential for vindictiveness must be focused on to determine whether a particular procedure violates due process. U.S.C.A.Const. Amend. 5.

6. Constitutional Law ⇐318(7)

In examining a system for potential vindictiveness against party who appeals, the inquiry should be directed at the institution or system under scrutiny, rather than merely focusing on the individuals involved or the facts present in the particular situation.

7. Constitutional Law ⇐275(2)

Fifth Amendment does not require an opportunity for a hearing prior to Secretary of Labor's assessment of a proposed penalty against an employer for a violation of the Occupational Safety and Health Act. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.; U.S.C.A.Const. Amend. 5.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (Georgia Case).

Before COLEMAN, MORGAN and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Dan J. Sheehan petitions this court to review an order of the Occupational Safety and Health Review Commission (Commission) affirming a $500.00 penalty assessed by the Secretary of Labor (Secretary) under the Occupational Safety and Health Act of 1970 (OSHA). 29 U.S.C. § 651 et seq. Petitioner, a painting contractor, was cited for a serious violation under the general duty clause of OSHA for failing to provide a "place of employment free from recognized hazards likely to cause death or serious physical harm ." 29 U.S.C. § 654(a)(1). The citation was prompted by the death of petitioner's employee who was electrocuted while working on a scaffold erected within approximately one foot of an electrically-charged power line carrying current in excess of 7,000 volts. Sheehan was ordered to abate the hazard immediately and was served with a $500.00 proposed penalty on August 3, 1973.

By letter dated August 22, 1973, Sheehan notified the Commission:

> We are not contesting your August 3, 1973 citation. We admit that the scaffold was erected too close to the energized wire. However, we would like for you to look further into the matter and possibly with this new information, lift the proposed $500.00 penalty.

Sheehan further explained that his company had always been "very safety conscious," and begged "release" of the penalty, pointing out that the deceased employee had been warned by the foreman not to use the part of the scaffolding near the wire. The letter was accompanied by a report prepared by the foreman describing the circumstances surrounding the fatal accident and emphasizing that the deceased employee had been alerted to the danger.

Upon receipt of the letter, the Secretary notified the Commission of Sheehan's "notice of contest" and a hearing before an Administrative Law Judge was conducted on December 27, 1973. The judge construed Sheehan's letter as contesting solely the appropriateness of the penalty and consequently refused to review Sheehan's challenges to the validity of the citation. The judge affirmed the $500.00 penalty and his order became final when no member of the Commission exercised discretionary review. 29 U.S.C. § 661(i). Sheehan then petitioned this court to review the order pursuant to 29 U.S.C. § 660(a) and was granted a stay by the Commission pending these judicial review proceedings.

Petitioner challenges the citation and penalty on three bases: 1) the judge erred in not reviewing the validity of the citation as well as the appropriateness of the penalty, 2) the general duty clause is invalid and unenforceable because it is constitutionally vague; and 3) the OSHA enforcement scheme is violative of Fifth Amendment due process guarantees for failing to provide for a hearing prior to imposition of a proposed penalty.

Under the expedited OSHA enforcement scheme, a citation and proposed penalty become a final order of the Commission unless contested by the employer within 15 working days of receipt of notification. 29 U.S.C. § 659(a). If the employer fails to contest, the order is not subject to review by any court or agency. *Id.* The threshold question then becomes whether Sheehan's letter of August 22 constituted a notice of contest of the citation or the proposed penalty or both. Petitioner first asserts that the letter should be construed as a contest of both the citation and the penalty. Second, petitioner argues that a contest of the proposed penalty alone is sufficient to allow the Commission to review the underlying violation. Finally, petitioner argues that the expedited OSHA procedure effectively chilled his right to request a hearing as to the validity of the citation.

Sheehan's first contention urges a clearly unreasonable construction of his own letter. Sheehan expressly stated that he was "not contesting" the citation and admitted that the scaffold was "too close" to the power line. The remainder of the letter, dealing with the safety practices of the company and describing how the deceased employee had ignored the foreman's warning, is directed solely to persuading the Secretary to reduce the amount of the proposed penalty.

[1] Common sense mandates that we reject as totally artificial Sheehan's urging that his letter should be construed only as an admission of certain factual allegations contained in the citation (*i. e.*, that the scaffolding was erected within one foot of the power line) and his contention that he did not intend it to be an admission of a violation of the general duty clause of OSHA. Even construing the letter in a light most favorable to Sheehan, we agree with the judge that the letter failed to contest the violation and was at most a weak attempt to contest the proposed penalty.

[2] Petitioner's second contention—that the contest of the penalty gave the judge jurisdiction to review the validity of the citation—must also fail. OSHA, Section 10(a), 29 U.S.C. § 659(a), and the regulations promulgated thereunder provide the means for employer-initiated review of citations and proposed penalties. The statute provides that "the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty." 29 U.S.C. § 659(a). Under 29 C.F.R. § 1903.17, the employer is instructed that "[e]very notice of intention to contest shall specify whether it is directed to the citation or to the proposed penalty, or both." Section 10(a) further provides that if within the designated time the employer fails to contest "the citation or proposed assessment of penalty, the citation

and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(a).

We have previously construed the above statutory scheme as mandating a distinction between a contest of a citation and a contest of a proposed penalty. *Brennan v. Occupational Safety and Health Review Commission (Bill Echols Trucking Co.)*, 487 F.2d 230, 233 34 (5th Cir. 1973). In *Echols* we held that an employer's failure to contest the citation in a letter which challenged the proposed penalty resulted in a final order as to the citation which could not subsequently be vacated by the Commission as a sanction against the Secretary for delaying transmission of the letter to the Commission. Petitioner urges that *Echols* does not control this litigation because the context in which that case arose was decidedly different from the instant case. Specifically, petitioner contends that the effect of the holding in *Echols* was to restrict the Commission's power to use the extreme sanction of dismissal to penalize the Secretary's reasonable interpretation of his duties under OSHA and that the court was primarily concerned with preventing prejudice to the Secretary. In contrast, Sheehan points out that allowing him opportunity to contest the citation in this instance would not prejudice the Secretary's rights. Sheehan further notes that the Commission has not been uniform in its interpretation of the requisites of Section 10(a)[1] and that the precedential value of *Echols* may be undermined by the panel's acknowledgement in that case that the difficulty of their task was "magnified by the paucity of the written argument presented to us." 487 F.2d at 232.

We decline to depart from this court's decision in *Echols* at the present time. If the Commission should determine to take the other view in a consistent course of administrative interpretations, in another case this court may choose to give controlling weight to that persuasive factor. Sheehan's letter not only failed to contest the citation, but affirmatively admitted the violation. We agree with the judge's finding that Sheehan had waived his right to challenge the citation.

As a final argument to support his contention that the judge erred in not reviewing the validity of the citation as well as the appropriateness of the penalty, petitioner asserts that the expedited OSHA enforcement scheme has a built-in chilling effect which deters employers from contesting citations and penalties and consequently denies their right to a hearing. Three provisions are claimed to impose the "OSHA Chill." First, under Section 17(j), the Commission may conceivably increase the amount of penalty proposed by the Secretary if the employer chooses to contest the citation or penalty. 29 U.S.C. § 666(i). Second, the Commission has the power to retroactively assess non-abatement penalties from the date of citation if it finds that the employer-initiated review was not in good faith or was instituted solely for delay or avoidance of penalties. 29 U.S.C. § 666(d). Third, a final order of

1. Petitioner cites the decision in *Selchow & Right Co.*, OSHRC Docket No. 1057, 3 CCH Employment Safety and Health Guide, ¶ 15,191 (August 28, 1972), as evidence that the Commission interprets the statutory language as providing a basis for Commission jurisdiction over all issues if either the citation or the penalty is contested. In the instant case, however, the judge did not mention *Selchow* but chose to rely on this court's decision in *Echols* to support his finding that the validity of the citation was unreviewable.

the Commission is not automatically stayed by commencement of review proceedings in a court of appeals. Rather, OSHA provides that unless the court of appeals affirmatively orders a stay, non-abatement penalties may start to accrue during the judicial appeal period. 29 U.S.C. § 660(a).

Before we reach the merits of Sheehan's "chilling effect" argument, we must first decide that he has standing to raise the issue. *See Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). In this case, Sheehan has not been directly penalized by any of the three provisions he cites as constituting OSHA's chilling effect. Neither the judge nor the Commission increased the proposed penalty assessed by the Secretary. There is no indication that the Commission will assess a per diem non-abatement penalty against the employer for taking a bad faith appeal. Further, since the Commission ordered a stay pending disposition of review proceedings in this court, Sheehan will suffer no punitive effects because he initiated judicial review. This court has previously failed to reach the merits of an employer's "chilling effect" challenge when the employer had not already been adversely affected by the challenged provisions of the Act. *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 518 F.2d 990, 1011 (5th Cir. 1975); *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84, (5th Cir. 1975). Sheehan persuasively argues, however, that the chilling effect of the statutory scheme has already taken its toll in this litigation. He raises the alternative contention that if the possibility of increased penalties had not operated as a deterrent, he would have challenged both the citation and the penalty in his letter of contest and would not have felt the necessity to couch his objections to the Secretary's actions in such conciliatory language. In sum, petitioner argues that the chill of the OSHA scheme has resulted in a loss of his right to a hearing on the validity of the citation.

[3] Since we have decided that petitioner failed to contest the citation and thus waived his right to a hearing on that issue before the judge and this court, we recognize Sheehan as sufficiently aggrieved to raise the chilling effect question.

[4] We hold that OSHA enforcement procedures do not operate to unconstitutionally chill petitioner's right to initiate a hearing under the Act. Sheehan first contends that the Commission's power to increase the proposed penalty under Section 17(j) places an unconstitutional deterrent on the employer's exercise of his right to contest. Under Section 17(j), the Commission is empowered to "assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(i). On several occasions, the Commission has taken the position that it may exercise its power under Section 17(j) to increase the proposed penalty after considering the factors outlined in the statute.[2] While acknowledging

2. *See Brennan v. Occupational Safety and Health Review Commission (Interstate Glass Co.)*, 487 F.2d 438, 441 (8th Cir. 1973). "As of May 16, 1972, penalties proposed by the Department of Labor had been modified in 58 percent of the cases appealed to the Review

that other circuits have differed on the Commission's right to impose an increased penalty, and we have not decided it,[3] we assume, without deciding, that the Commission has the power to increase the proposed penalty.

[5, 6] The question then becomes whether the threat of increased penalties after employer-initiated review violates the employer's due process rights under the Fifth Amendment. Since this precise question has not been decided by this court, we take our guidance from developments in the criminal law area. The decisions of the United States Supreme Court have repeatedly stressed that a system that allows the imposition of a more severe penalty following a successful appeal is not *per se* constitutionally infirm. *Chaffin v. Stynchcombe*, 412 U.S. 17, 29, 93 S.Ct. 1977, 1984, 36 L.Ed.2d 714 (1973); *Colten v. Kentucky*, 407 U.S. 104, 116, 92 S.Ct. 1953, 1960, 32 L.Ed.2d 584 (1972); *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S.Ct. 2072, 2079, 23 L.Ed.2d 656 (1969). The Court has instead focused on the potential for vindictiveness to determine whether a particular procedure violates due process. *Blackledge v. Perry*, 417 U.S. 21, 27, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628 (1974). When examining a procedural scheme to test for the "likelihood of vindictiveness," the Court has found it necessary to look not only for actual retaliatory motivation on the part of the sentencing body, but also to inquire as to the defendant's apprehension of such retaliatory motivation so as to prevent the defendant from being chilled in the exercise of his rights. *Blackledge v. Perry*, 417 U.S. 21, 27, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969). Further, this court has recently stated that in examining a system for potential vindictiveness, the inquiry should be directed at the institution or system under scrutiny, rather than merely focusing on the individuals involved or the facts present in the particular situation. *United States v. Floyd*, F.2d , (5th Cir. 1975).

The OSHA scheme allows the Commission to increase the proposed penalty imposed by the Secretary if, after the hearing provided by the statute, the Commission determines that such an increase is warranted. Until the employer contests the proposed penalty, there is no opportunity for a hearing. Thus the hearing conducted by the judge is in the nature of a *de novo* review. 29 U.S.C. § 659(c). *See Brennan v. Occupational Health and Safety Review Commission (Interstate Glass Co.)*, 487 F.2d 438, 441 (8th Cir. 1973). The Supreme Court has held that the possibility of imposition of an increased penalty by a court of general jurisdiction in a trial *de novo* following appeal from conviction by an inferior court does not impermissibly deter defendants from appealing their convictions. *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) The OSHA review system is not unlike

Commission. In 43 percent of the cases, the penalty was reduced, in 15 percent it was increased." 1 O.S.H.R. 1197 (May 18, 1972).

3. The Second and Eighth Circuits have expressed the view that the Commission may increase the penalty imposed by the Secretary of Labor. *REA Express, Inc. v. Brennan*, 495 F.2d 822, 825 (2d Cir. 1974). *Brennan v. Occupational Health and Safety Review Commission (Interstate Glass Co.)*, 487 F.2d 438, 442 (8th Cir. 1973). In contrast, the Ninth Circuit recently stated that it approved of a Commission order which asserted that the Commission had no authority to enhance a proposed penalty. *Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 281 (9th Cir. 1974).

the system involved in *Colten*. In each system, the body which has the power to increase the penalty is not the same body which imposed the initial, lighter penalty. Thus the Commission will not have the same personal stake in seeing that the Secretary's orders go unchallenged as it would if it were protecting its own orders.

The analogy between OSHA and a two-tier trial court system is not a perfect one. Further inquiry is necessary to test for potential vindictiveness. This court has previously been guided by four factors laid down by the Supreme Court in *Chaffin v. Stynchcombe*. *See United States v. Floyd*, F.2d , (5th Cir. 1975). In deciding that higher sentences imposed by a jury after retrial did not violate the due process clause nor chill defendant's exercise of his right to appeal, the Court in *Chaffin* explained that (1) the jury had not been informed of the prior sentence; (2) the jury did not know whether the prior trial was on the same charge or resulted in a conviction or mistrial; (3) the jury was a separate and distinct judicial authority having no personal stake in the prior action and no motivation for self-vindication; and (4) the jury was unlikely to be sensitive to the institutional interest that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.

In the case at bar, we find that only the third insulating factor mentioned in *Chaffin* is present in the OSHA review scheme. Under OSHA, the Commission will of necessity be informed of the proposed penalty and of the circumstances surrounding the issuance of the citation. Further, it could be argued that the Commission has an institutional interest in discouraging employer-initiated appeals from the Secretary's orders. However, as has been recognized by the Supreme Court in *Chaffin*, the inquiry into the chilling effect of a procedural scheme must be made on "a case by case basis." *Chaffin v. Stynchcombe*, 412 U.S. 17, 32, 93 S.Ct. 1977, 1985, 36 L.Ed.2d 714 (1973). An insulating factor which is present in this case, and one which we believe is decisive, is the opportunity for the employer to obtain judicial review of an increased penalty imposed by the Commission by filing a petition in the court of appeals. 29 U.S.C. § 660(a). The court is empowered to review the appropriateness of the penalty using an "abuse of discretion" standard. *See REA Express, Inc. v. Brennan*, 495 F.2d 822, 827 (2d Cir. 1974), and the *Interstate Glass Co.* case, 487 F.2d at 442. Further, the court of appeals will be able to test the propriety of the increased penalty against the standards provided in Section 17(j). If the Commission does not offer any reason for its decision to increase or if there is evidence that the increase was designed to penalize the employer for exercising its right to contest, the court will be in a position to correct such an abuse of discretion. The opportunity for such corrective action by the courts is a sufficient safeguard to allay the fears of employers who might be fearful that a contest of a citation and proposed penalty would hazard increased penalties by way of retribution.

The second feature of the OSHA enforcement scheme challenged by petitioner as contributing to the chilling effect of OSHA, is also insulated by the possibility of judicial review. If the Commission chooses to impose retroactive penalties for non-abatement after a finding that the review initiated by the petitioner was in bad faith or solely for the purpose of delay, the court will be

able to review that decision in the same manner as an original violation. 29 U.S.C. § 666(d). *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84, (5th Cir. 1975).[4]

In deciding whether the Commission's action was appropriate, the court may be guided by its experience in interpreting and applying 28 U.S.C. § 1912 and Rule 38 of the Fed.R.App.P. which authorize an award of damages and double costs to the appellee in case of frivolous appeals. *See Monroe Auto Equipment Co. v. NLRB*, 511 F.2d 611, 614 (5th Cir. 1975); *Dunscombe v. Sayle*, 340 F.2d 311 (5th Cir. 1965). The courts have always been cautious to limit application of such a severe penalty to unusual cases where there is a clear showing of bad faith. *See Fluoro Electric Corp. v. Branford Associates*, 489 F.2d 320, 326 (2d Cir. 1973); *West Virginia v. Pfizer & Co.*, 440 F.2d 1079, 1092 (2d Cir. 1971). We have no reason to believe that the Commission will be less inclined to use its power in an equally careful manner, especially in light of the newness of the Act and the novelty of many of the legal questions raised on appeal.

Finally, the burden placed on the employer to obtain a stay pending judicial review in the court of appeals is not such a burden as would warrant a finding that judicial review is not effectively available to the employer under the Act. The employer has the opportunity not only to ask the court of appeals for a stay order under 29 U.S.C. § 660(a), but may also petition the Commission to stay its own final order. *Lance Roofing v. Hodgson*, 343 F.Supp. 685, 689 90 (N.D. Ga.), *aff'd*, 409 U.S. 1070, 93 S.Ct. 679, 34 L.Ed.2d 659 (1972). As is evidenced by the Commission's willingness to stay its penalty order in the case at bar, an employer is not likely to be deterred from appealing an incorrect decision because of the necessity for asking for a stay from the court or Commission.

Finding the statutory scheme does not contain a "chill" factor which abridges due process, we hold that the judge was correct in deciding that the only issue to be considered in this case is the appropriateness of the penalty. Hence, petitioner's attempted challenge to the validity of the citation based on the alleged vagueness of the general duty clause was correctly rejected by the Commission.

[7] Petitioner's third objection to the OSHA review system is without merit. This court has recently rejected a due process challenge to OSHA's enforcement scheme and has held that the Fifth Amendment does not require an opportunity for a hearing prior to the Secretary's assessment of a proposed penalty. *Atlas Roofing Co. v. Occupational Health and Safety Review Commission*, 518 F.2d 990, 1012 (5th Cir. 1975).

Affirmed.

4. A three-judge district court has expressed fear that OSHA does not provide an "effective means of challenging" the Commission's decision to assess retroactive non-abatement penalties against an employer who initiates a bad faith appeal. *Lance Roofing v. Hodgson*, 343 F.Supp. 685, 690 n. 4 (N.D.Ga.), *aff'd*, 409 U.S. 1070, 93 S.Ct. 679, 34 L.Ed.2d 659 (1972). However, this court has stated that even if the Act does not provide for judicial review, the Administrative Procedure Act, 5 U.S.C. § 704, will afford a remedy for the employer. *Lake Butler Apparel Co.*, 519 F.2d 84, (5th Cir. 1975).

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UNITED STATES COURT OF APPEALS
OR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2764

OSHRC No. 4298

DAN J. SHEEHAN COMPANY,

Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, and JOHN T. DUNLOP, Secretary of Labor,

Respondents.

- - - - -

Petition for Review of an Order of the Occupational Safety and Health Review Commission (GEORGIA CASE)

- - - - -

Before COLEMAN, MORGAN and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the petition of Dan J. Sheehan Company for review of an order of the Occupational Safety and Health Review Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Occupational Safety and Health Review Commission in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

October 8, 1975

Issued as Mandate:

APPENDIX B

SECRETARY v. DAN J. SHEEHAN COMPANY

OSAHRC Docket No. 4298 May 31, 1974

BRADY, JUDGE, OSAHRC: This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (hereinafter referred to as the Act) to contest a citation issued by the Secretary of Labor (hereinafter referred to as the Secretary) pursuant to Section 9(a) of the Act. The citation which was issued August 3, 1973, alleges that as the result of an inspection of Respondent's workplace at Bull and 33rd Streets, Savannah, Georgia, Respondent violated Section 5(a)(1) of the Act. It is alleged that:

> The employer failed to furnish its employees working at a job site a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to its employees in that employees were required or permitted to perform work on a metal scaffold which was erected at the site of an approximate height of 36 feet and within approximately 1 foot of an electrically charged power line carrying current in excess of 7,000 volts. (7-26-73)

A notice of proposed penalty was issued with the citation. The jurisdiction of the Commission was invoked on August 22, 1972, upon the filing of Respondent's notice of contest wherein it was stated that:

> We are not contesting your August 3, 1973 citation. We admit that the scaffold was erected too close to the energized wire. However, we would like for you to look further into the matter and possibly with this new information, lift the proposed $500.00 penalty.

On August 31, 1973, the Secretary filed the complaint herein, setting forth the alleged violation and proposed penalty, and on September 14, 1974, Re-

spondent's answer was filed. Subsequently, on October 10, 1973, the Secretary filed a motion to amend the Complaint, which was denied, and at the commencement of the hearing Respondent moved to amend the notice of contest which was likewise denied. It was indicated that the purpose of the Secretary's motion was to clarify the complaint by more accurately defining the issues therein. In view of the allegations contained in the complaint as filed, and the subsequent answer of denial, it was determined that a hearing should be held on the existing pleadings.

On December 27, 1973, a hearing was held at Savannah, Georgia, and no additional parties sought to intervene.

Mr. Perry Q. Collins, Compliance Officer, testified that on July 26, 1973, he conducted an inspection of the aforesaid worksite, where respondent had erected a tubeless metal scaffolding for miscellaneous painting on the woodwork and steeple of a church. (Tr. 9) (Exhs. 1-7) He stated that he observed the scaffold, which was built up approximately thirty-six feet, and to within twelve to eighteen inches of a power transmission line. He indicated that a hazard was presented due to the closeness of the metal scaffolding to the line which could result in possible electrocution, or shock which would cause an employee to fall. Also, earlier on the date of the inspection a fatal accident occurred as the result of an employee touching the line and being electrocuted (Tr. 11, 12).

Mr. Collins testified that in determining the proposed penalty the factors set out in Section 17(j) were duly considered. He described the manner in which the alleged violation was determined to be serious, in addition to a discussion of Respondent's history of previous violations, its size, the credits given therefore, and also Respondent's good faith. Maximum penalty adjustments were allowed Respondent in conformance with the Secretary's guidelines (Tr. 16-18, Exh. 18).

Mr. James E. Utsey, Supervisor of Safety and Training for the Savannah Power and Electric Company, testified that the electric power lines adjacent to Respondent's worksite carried seventy-six hundred and twenty volts to the aforementioned accident (Tr. 23). He observed the scaffold at the worksite and believed it to be approximately twelve to fifteen inches from the nearest power line (Tr. 25).

Mr. Dan Sheehan, Jr., President of Dan Sheehan Company, testified with reference to Respondent's safety policies, and efforts to comply with the Occupational Safety and Health Act (Tr. 28).

Mr. Dwight A. Spiegel, acting foreman on the job, testified that at the time of the accident the scaffolding was in the process of being constructed higher. He stated that prior to commencing work on July 26, 1973, he had indicated to Mr. Padgett, the deceased, "Now, let's don't go up this particular end. We don't know if that wire is hot. We don't know if it's grounded. We don't know nothing. Let's don't even use this end of the scaffold."

Also, he was instructed to climb up the inside of the scaffold, as there was more protection against falling. He revealed however that Mr. Padgett climbed up the outside of the scaffold and came in contact with the wire (Tr. 36, 37). Mr. Spiegel acknowledged that the wire was approximately twelve to fifteen inches from the scaffold at the nearest point, and although he didn't know if the wire was "hot" he thought it was potentially dangerous (Tr. 40, 41).

Mr. Selby C. Strickland, a painter, testified that at the time in question he was erecting scaffolding, but prior to going up he cautioned Mr. Padgett to watch the wire and not to go up the particular ladder (Tr. 44).

The Secretary has taken the position that the sole issue in the proceeding relates to the appropriateness of the penalty. Respondent maintains however that the notice of contest should be construed only to mean that it was not contesting certain allegations contained in the citation, namely, that the metal scaffold was erected within approximately one foot of a power line. Also, unlike as in the case of a specific standard promulgated by the Secretary, such an allegation does not make out a prima facie allegation of a violation of section 5(a)(1). It being contended that the Secretary must prove (1) that the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious physical harm as held by the District of Columbia Court of Appeals in *National Realty and Construction Company, Inc.* v. *OSHRC* (No. 72-1978, D.C. Cir. December 13, 1973).

In viewing the notice of contest, it must be held that Respondent failed to contest the violation alleged in the citation and complaint, thus leaving the only issue in this proceeding the appropriateness of the proposed penalty. A most liberal construction of the notice leaves no doubt regarding the intent of such contest, Further, the pleadings and evidence of record adequately shows the nature of the violation. See *Florida East Coast Properties, Inc.*, OSHRC Docket No. 2354, and *Brennen* v. *OSHRC and Echols Trucking Co.* No. 73-1670 (5th Cir. November 13, 1973).

The evidence also reveals that the factors set out in section 17(j) of the Act were properly considered in proposing the penalty including exhibit 8 which was indicated as accurately reflecting the results of such consideration. It was shown that maximum credits were allowed Respondent pursuant to the Secretary's guidelines.

In view of the gravity of the violation which involves the hazard of death or serious bodily harm the proposed penalty is deemed appropriate.

At the conclusion of the hearing Respondent moved to dismiss the citation and complaint because section 5(a)(1) of the Act is unconstitutionally vague and ambiguous. Further, that when a specific standard applies to a particular situation it must be citated rather than section 5(a)(1) the general duty clause. In view of Respondent's notice which contests the penalty only, those matters relating to the citation are not before the Commission for review in this proceeding.

FINDINGS OF FACT

1. Dan J. Sheehan Company is a corporation having a place of business at 541 Oglethorpe Avenue, Savannah, Georgia, where it is engaged in contract painting work.

2. On July 26, 1973, Respondent was engaged in painting the Sacred Heart Church located at Bull and 33rd Streets, Savannah, Georgia.

3. On July 26, 1973, metal scaffolding used by Respondent's employees was erected within approximately a foot of an electric power line carrying current in excess of 7,000 volts.

4. On August 3, 1973, Respondent was issued a citation with a notice of proposed penalty, as a result of an inspection of the worksite by an authorized representative of the Secretary.

5. On August 22, 1973 Respondent filed a notice of contest which set forth that it was not contesting the citation of August 3, but only the proposed penalty.

6. On August 31, 1973, the Complaint was filed herein alleging the violation and penalty.

7. At the aforementioned time and place Respond-

ent failed to furnish its employees working at the jobsite a place of employment free of recognized hazards that were causing or likely to cause death or serious physical harm.

8. The proposed penalty for the serious violation herein, was determined after due consideration was given to size of Respondent; gravity of the violation, good faith, and history of previous violations. Such penalty is found to be reasonable and appropriate.

Conclusions of Law

1. Dan J. Sheehan Company at all times pertinent hereto was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and subject matter herein, pursuant to 10 (c) of the Act.

2. Respondent is and at all times pertinent hereto, required to comply with safety and health regulations promulgated by the Secretary pursuant to Section 6(a) of the Act.

3. The citation and abatement period is a final order of the Commission pursuant to Section 10(a) of the Act.

4. A penalty of $500.00 is assessed for the serious violation contained in the citation.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is

ORDERED

1. The proposed penalty in the amount of $500.00 for violation of Section 5(a)(1) of the Act is hereby assessed. □

Supreme Court, U. S.
FILED
FEB 18 1976
MICHAEL RODAK, JR., CLERK

No. 75-747

In the Supreme Court of the United States

OCTOBER TERM, 1975

DAN J. SHEEHAN COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the enforcement provisions of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, violate due process of law by imposing a "chill" on the exercise of an employer's right to a hearing under the Act.

1. The background and structure of the Occupational Safety and Health Act of 1970 are detailed in our brief in opposition to a related petition, *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission,* No. 75-748, and will not be repeated here except as relevant to petitioner's claims. The Act, passed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. 651, was intended to encourage employers voluntarily to reduce worksite safety and health hazards. The Secretary of

Labor was empowered to issue mandatory safety and health standards for such employers and to police these requirements with "an effective enforcement program." 29 U.S.C. 651(3), (10).

Under the Act's expedited enforcement procedures, the Secretary is authorized to inspect places of employment, issue citations to employers for safety and health violations discovered at the worksite, and propose civil penalties and reasonable abatement periods for such violations. 29 U.S.C. 657(a), 658(a), 659(a). These proposed assessments, which range from zero for *de minimis* or non-serious violations, to $1,000 for serious violations, to not more than $10,000 for willful or repeated violations, also may include a civil penalty of up to $1,000 per day where subsequent inspection reveals that a prior abatement order has not been satisfied. 29 U.S.C. 659 (b), 666(a)-(d). All such assessments must be based on the gravity of the violation and the cited employer's size, good faith safety efforts, and past safety history. 29 U.S.C. 666(i).

If an employer wishes to contest the citation and/or proposed penalty, he must notify the Secretary within 15 working days; in the absence of such notice, the citation and penalty become final. 29 U.S.C. 659(a), (c), 660(b). If an employer timely contests the citation, any abatement requirement is suspended pending a final administrative ruling and the case is scheduled for hearing before an administrative law judge of the Occupational Safety and Health Review Commission, an adjudicatory agency independent of the Secretary. 29 U.S.C. 659(b), (c), 661, 666(d). The judge's decision becomes the final order of the Commission unless a Commissioner directs review within 30 days of its issuance. 29 U.S.C. 659(c), 661(i).

If review is directed, the Commission's subsequent order becomes final unless the aggrieved employer timely petitions for judicial review in the appropriate court of appeals. While the filing of a petition for review does not automatically stay the effectiveness of the Commission's order, either the Commission or the reviewing court may grant a stay pending judicial review. 29 U.S.C. 660(a); 29 C.F.R. 2200.92.

If the Secretary determines that an employer's contest of a citation was in bad faith or solely for purposes of delay, the Secretary may propose per diem penalties retroactive to the original abatement date set by the contested citation. The employer, of course, may challenge these monetary assessments in the same manner as he may contest any other proposed penalty, including review by the Commission and the court of appeals. 29 U.S.C. 659(b), (c), 666(d). See *Lake Butler Apparel Co.* v. *Secretary of Labor*, 519 F.2d 84, 87 (C.A. 5).

2. In July 1973, an employee of petitioner Dan J. Sheehan Company was electrocuted when he came into contact with a high-voltage line. As a result of this fatality, the Secretary inspected petitioner's worksite and cited petitioner for a serious safety violation,[1] ordered that the unsafe condition be abated immediately, and proposed a $500 penalty. Petitioner contested only the proposed

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[1]The facts showed that petitioner's "employees were required or permitted to perform work on a metal scaffold which was erected at the site of an approximate height of 36 feet and within approximately 1 foot of an electrically charged power line carrying current in excess of 7,000 volts" (Pet. App. 1b). The Secretary therefore determined that petitioner had violated 29 U.S.C. 654(a)(1), which requires an employer to furnish places of employment that "are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

penalty and a hearing was held before an administrative law judge limited to that issue (Pet. App. 2a-3a; 1b-6b).

The judge concluded that the Secretary had properly considered the relevant statutory factors in proposing the penalty and that the amount of the penalty was appropriate in light of those factors (Pet. App. 4b-6b). This decision became the final order of the Commission when no Commissioner directed further review. On petitioner's motion, however, the Commission stayed its order pending review in the court of appeals (Pet. App. 3a; 6b). On October 8, 1975, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the Commission's order (Pet. App. 1a-8a; 520 F.2d 1036).

Petitioner contends (Pet. 4-8) that three aspects of the Act's civil enforcement scheme unconstitutionally "chill" the exercise of an employer's right to a hearing. The court of appeals correctly rejected this claim, which relies totally upon language in several recent decisions of this Court involving inapposite *criminal* sanctions (Pet. App. 5a-8a). Moreover, the ruling of the court below is in accord with the decisions of other circuits that have considered the issue. See *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission*, C.A. 10, No. 75-1070, decided January 21, 1976; *Brennan* v. *Winters Battery Manufacturing Co.*, C.A. 6, No. 75-1367, decided December 18, 1975; cf. *REA Express, Inc.* v. *Brennan*, 495 F.2d 822, 825 (C.A. 2); *Brennan* v. *Occupational Safety and Health Review Commission*, 487 F.2d 438, 442 (C.A. 8).[2] There is no necessity for further review.

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[2]Although dicta in *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1202-1203 (C.A. 3), affirmed *en banc*, 519 F.2d 1215, pending on petition for a writ of certiorari, No. 75-748, and *Dale M. Madden Construction Co., Inc.* v. *Hodgson*, 502 F. 2d 278, 281 (C.A. 9), suggest that the Commission may lack authority to increase the penalty proposed by the Secretary, no circuit has held that the Commission is without power to adjust a proposed penalty and the court of appeals here assumed such power *arguendo*. Cf. 29 U.S.C. 659(c).

a. Petitioner's primary contention—that the Commission's authority to assess a higher monetary penalty after a hearing than that proposed by the Secretary is an unlawful deterrent to an employer's decision to seek Commission review—is both factually and legally erroneous. An increase in penalty, which may be ordered only after a full evidentiary proceeding before an independent administrative law judge, would represent not an attempt to discourage review, but merely a more informed evaluation of the salient facts in light of the relevant statutory factors, such as the gravity of the violation and the past history of the employer. 29 U.S.C. 666(i).[3]

Moreover, petitioner has suggested no logical reason why the Commission, an independent agency whose sole function is the adjudication of complaints initiated by employer contests, would desire to discourage review of the Secretary's determinations or to "punish" employers who seek review. The Commission's power to modify penalties actually has provided an incentive rather than a deterrent to review, since a study of more than 300 recent Commission decisions reveals that it has increased the penalty in only five percent of its cases while it has *reduced* the penalty in more than 50 percent of the cases.[4] Finally, in the instant case the Commission did not increase the penalty proposed by the Secretary (Pet. App. 4a-5a).

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[3]The Secretary's proposed penalty, of course, is based upon a worksite inspection, which may not include a thorough investigation and will certainly not reflect comprehensive evidence of the type adduced at an administrative hearing. 29 U.S.C. 658(a).

[4]These figures were compiled by the Management Information System of the Occupational Safety and Health Review Commission.

Nor would the due process clause be violated even if the Commission exercised its power to assess higher penalties with greater frequency. In the area of criminal law (where the desire to deter or punish appellants obviously may be far stronger than here), this Court has held that the due process clause does not necessarily prohibit a state from imposing a greater sentence upon a defendant after a retrial. In *Colten* v. *Kentucky*, 407 U.S. 104, for example, the Court upheld a two-tier system that afforded defendants convicted in an inferior court a complete trial *de novo* in a higher court, with the possibility of a greater punishment upon conviction. See also *Chaffin* v. *Stynchcombe*, 412 U.S. 17; *North Carolina* v. *Pearce*, 395 U.S. 711. As the Court noted in *Blackledge* v. *Perry*, 417 U.S. 21, 27:

> The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness."

The court of appeals properly concluded that there was no "realistic likelihood" of vindictiveness under the Act (Pet. App. 6a-7a):

> The OSHA review system is not unlike the system involved in *Colten*. In each system, the body which has the power to increase the penalty is not the same body which imposed the initial, lighter penalty. Thus the Commission will not have the same personal stake in seeing that the Secretary's orders go unchallenged as it would if it were protecting its own orders.

Moreover, as the court below also indicated (Pet. App. 7a), the Commission's discretion to increase a penalty proposal is institutionally limited by the narrow range of permissible penalties under the Act and by the explicit statutory criteria that must be applied as a matter of record to justify *any* penalty assessment. 29 U.S.C. 666(i). Thus, the Commission must affirmatively state its reasons for imposing a higher penalty and its decision is not hidden, but is fully subject to effective review in the court of appeals.

Finally, as indicated above, the Commission's sole statutory responsibility is to adjudicate contested citations and penalties under the Act; it strains common sense to suggest that the statutory scheme authorizing review by the Commission also gives rise to an institutional vindictiveness against the only class of persons—employers—who are able to initiate Commission review. Consequently, there is no reasonable basis for an employer to be dissuaded from contesting the Secretary's action or for the Commission to be motivated by improper considerations in reviewing a disputed citation or civil penalty.

b. Petitioner's second contention is that the Secretary's authority to propose retroactive penalties for nonabatement, if he finds that the employer sought review of a citation in bad faith or for the purpose of delaying compliance, "chills" the employer's right to a hearing. This claim is equally unpersuasive; not only has the Secretary never invoked this provision, but a retroactive nonabatement penalty would be subject to the same review procedures as any other penalty, including judicial review. 29 U.S.C. 659(b), (c), 666(d). See *Lake Butler Apparel Co.* v. *Secretary of Labor*, *supra*, 519 F.2d at 87. Furthermore, as the Court emphasized in *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 30, the relevant question in analyzing a claim of

"chilling effect" is whether the alleged "chill" is unnecessary to the achievement of some legitimate goal. The Secretary must possess the discretionary authority to deal effectively with the rare occasion when an employer, in bad faith, uses the opportunity for review solely to evade his statutory duty to correct a clearly unsafe or unhealthy working condition.

c. Finally, petitioner contends that the Act is constitutionally defective because the Commission's orders are not automatically stayed pending a petition for review in the court of appeals. However, an employer may seek a stay from the Commission or the court of appeals and, as in the instant case (Pet. App. 3a, 8a), such stays are freely granted.[5] See 29 U.S.C. 660(a); *Lance Roofing Co.* v. *Hodgson*, 343 F. Supp. 685, 689-690 (N.D. Ga.), affirmed, 409 U.S. 1070. Thus, the court of appeals correctly concluded that (Pet. App. 8a):

> [A]n employer is not likely to be deterred from appealing an incorrect decision because of the necessity for asking for a stay from the court or Commission.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,
Department of Labor.

FEBRUARY 1976.

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[5]This statutory provision is not unique. See, *e.g.*, Section 106(e) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 755, 30 U.S.C. 816(e), a statute recently construed by the Court in *National Independent Coal Operator's Association* v. *Kleppe*, No. 73-2066, decided January 26, 1976, and Section 10(g) of the National Labor Relations Act, 49 Stat. 455, 29 U.S.C. 160(g).